MOTION FILED
DEC 3 0

No. 94-972

In The Supreme Court of the United States

October Term, 1994

TRI-STATE MACHINE, INC.,

Petitioner,

v.

NATIONWIDE LIFE INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND PROPOSED BRIEF OF *AMICUS CURIAE* HANLEY C. CLARK, INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA, IN SUPPORT OF GRANT OF TRI-STATE MACHINE, INC.'S PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Hanley C. Clark, Insurance Commissioner of the State of West Virginia, through his counsel, moves this Honorable Court for leave to file a brief *amicus curiae* in the form of that attached hereto. Statements in support are as follows:

1. This motion for leave to file a brief *amicus curiae* is necessary under Rule 37 of the Rules of the Supreme Court because the written consent of all parties to the filing of the brief has not been granted. Petitioner Tri-State Machine, Inc. has consented to the filing of this brief. Respondent Nationwide Life Insurance Company, the other party to this case, has not refused consent, but to date has not provided oral or written consent to the filing of this brief, despite requests by the Insurance Commissioner that it do so.

2. The Insurance Commissioner's interest in this matter is great because the case has very significant ramifications for the regulation of insurance, particularly employer-sponsored health care, within the State of West Virginia.

3. The Insurance Commissioner respectfully maintains that the Court should be apprised of the West Virginia Insurance Commissioner's interest in this matter because he believes them to be highly relevant in assessing the importance, practical and legal, of this case.

4. The interests of the Insurance Commissioner are described in more depth in the attached proposed *amicus* brief, incorporated herein by reference.

For these reasons, and as more fully explained in the attached brief, the West Virginia Insurance Commissioner hereby respectfully requests leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

This brief is filed on behalf of Hanley C. Clark, the Insurance Commissioner of the State of West Virginia, in support of the grant of the Petitioner's request for a writ of certiorari.

This case involves important questions regarding the balance of power between the federal government and the States, and the ability of West Virginia to regulate the conduct of insurance companies that sell an enormous amount of insurance to West Virginia businesses for the benefit of West Virginia workers.

SUMMARY OF ARGUMENT

The case in question raises essentially two issues which are of great consequence to the West Virginia Insurance Commissioner:

a. What is the proper scope of the Saving Clause and the Deemer Clause and how should those two clauses be read together to further the objectives of ERISA without unnecessarily impairing the time-honored and well-recognized right of the States to regulate insurance?; and

b. When is an insurance product not insurance within the meaning of the Deemer Clause?

It is time for the Supreme Court to hear and decide this case because it presents hotly contested issues which affect employers and employees in West Virginia and throughout the country. The issues are of extreme practical importance to many aspects of employer-sponsored health care and government's role in regulating the health care industry. They are issues of great social and financial importance.

ARGUMENT

Over the years, Congress and this Court have affirmed and reaffirmed the fact that the taxation and regulation of insurance should be left to the States.

From at least 1889 to 1944, Supreme Court precedent has made it clear that insurance is a matter of traditional state concern to be regulated by the States. *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 539 (1978); *see Paul v. Virginia,* 75 U.S. 168, 183 (1868).

In 1944, when the Court held, in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, *reh'g denied,* 323 U.S. 811 (1944), that an insurance company was subject to federal law because it was engaged in interstate commerce, the decision "provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry." *Barry,* 438 U.S. at 539. As a result, "Congress moved quickly, enacting the McCarran-Ferguson Act within a year of the decision in *South-Eastern Underwriters." Id.*

In passing the McCarran-Ferguson Act, 15 U.S.C. § 1101 *et seq.* (1988), "[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408 (1946).

More recently, this Court described the McCarran-Ferguson Act as "restor[ing] the *supremacy* of the States in the realm of insurance regulation." *United States Dept. of the Treasury v. Fabe,* ____ U.S. ____, 113 S.Ct. 2202, 2207 (1993) (emphasis added). Finally, when Congress passed ERISA, it expressly carved out insurance regulation as a matter that must be left to the States.

Yet, judicial rulings have increasingly encroached upon the States' rights in this area. The Fourth Circuit's holding in this case finds that the West Virginia Unfair Trade Practices Act, W. Va. Code §§ 33-11-1 *et seq.* (the "Act"), is not a law regulating the business of insurance, notwithstanding that the West Virginia Act was specifically adopted in reliance on the States' ability to regulate insurance under the McCarran-Ferguson Act. *See* W. Va. Code § 33-11-1.

The Fourth Circuit's opinion and others like it expansively read ERISA's preemption provision, thereby broadening federal powers at the great expense of the States. The decision of the Fourth Circuit in this case has impaired the right and interest of West Virginia, through its Insurance Commissioner, to regulate insurance sold within West Virginia's boundaries.

A. The Relate to and Saving Clause Preemption Analysis

The Fourth Circuit opinion in this case, *Tri-State Machine, Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309 (4th Cir. 1994), allows insurance companies to successfully defend state law causes of action, including fraud claims under West Virginia's Unfair Trade Practices Act, asserted by employers who have purchased insurance for their employees.

The Fourth Circuit's opinion completely ignores the unique feature of this case in its analysis of the Act and caselaw.

The identity of Tri-State as a *purchaser* of employee benefit plan insurance is the key to the Insurance Commissioner's interest in this case. This is not a typical case where a plan participant or beneficiary is seeking duplicative remedies for improper processing of ERISA claims.

Here, the gist of Tri-State's claim is that it was defrauded in the purchase of insurance and cannot seek redress under the West Virginia Act, which was precisely crafted to protect such a purchaser. The inability of insurance purchasers to remedy wrongs under the Act obviously renders the Act completely ineffective.

The Fourth Circuit's opinion construes the "relate to" clause, 29 U.S.C. § 1144(a) (1988), *vis-a-vis* the "saving" clause, 29 U.S.C. § 1144(b)(2)(A)(1988), so as to take the regulation of a large share of insurance matters from West Virginia and place them with the federal government. The opinion will weaken West Virginia's ability to deter the unfair practices of insurance companies. It will also strip the Insurance Commissioner of the ability to ensure compliance with West Virginia's Unfair Trade Practices Act (and every other state having unfair trade practices legislation).

As such, the preemption analysis should be revisited by this Court because of its significant effect upon employers who sponsor health care plans for their workers. The Fourth Circuit's holding will have significant ramifications throughout the country as well as in West Virginia.

This Court has used the McCarran-Ferguson Act as the touchstone of saving clause analysis. *See Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985). The Fourth Circuit's failure to recognize (i) Tri-State as a West Virginia insurance purchaser, and (ii) the interest of West Virginia in directly regulating the sale of insurance through application of its Unfair Trade Practices Act, is contrary to the dictates of the McCarran-Ferguson Act and must be reviewed.

Further, the Insurance Commissioner maintains that the question presented in this case of whether premium

manipulation "relates to" an ERISA plan in the first instance (thereby invoking preemption analysis) is an extremely important issue with great practical ramifications. It is the Insurance Commissioner's position that preemption should not arise simply because a case involves a billing dispute over the computation of premiums which are used to pay for insurance that funds an employee benefit plan.

If an employer such as Tri-State is deprived of its rights under state law, including common law contractual remedies, the employer is greatly disadvantaged and the insurance company is unnecessarily empowered in the parties' commercial relationship.

Insurance companies doing business in West Virginia are regulated by the Insurance Commissioner, but if the common law rights of West Virginia's employers are taken away, much of the State's ability to "regulate" insurance companies is lost.

B. The Deemer Clause Analysis

The Fourth Circuit majority opinion also broadens the scope of a self-funded plan to include an insured plan when the insured plan in question is categorized as self-funded "for the most part." *Tri-State Machine, Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309, 315 (4th Cir. 1994).[1] The Fourth

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[1]The Fourth Circuit referenced its opinion in *Thompson v. Talquin Building Products Co.*, 928 F.2d 649, 653 (4th Cir. 1991), as support for this finding. However, *Thompson* involved a dispute arising out of a self-funded plan that had purchased stop-loss insurance, and there the terms of the stop-loss policy and its funding had nothing to do with the dispute. In the instant case, the plan was *funded* by the purchase of insurance and the dispute arises out of alleged unfair practices in the computation of premiums charged by an insurance company for the insurance in question—a matter of deep concern to those charged with the duty of regulating insurance practices.

Circuit broadens the scope of preemption (correspondingly, narrowing the States' ability to regulate insurance) by ruling that insurance products which are partially self-funded invoke application of the Deemer Clause. 29 U.S.C. § 1144(b)(2)(B)(1988).

This holding is nonsensical because the Deemer Clause protects employee benefit plans, not insurance policies or insurance companies, from compliance with state insurance law. *See Tri-State Machine,* 33 F.3d at 318-19 (Luttig, J., dissenting). The Deemer Clause is inappropriately invoked because suit was not instituted against the employee benefit plan.

Further, an insurance product is either insurance to some extent, or it is not (in which case it is not insurance). But the Fourth Circuit adopts a new idea that something which is self insurance "for the most part" invokes the Deemer Clause. This is akin to being half pregnant.

Insurance, plain and simple, exists when risk of loss is transferred to an insurance company. When a product labeled "insurance" transfers no risk because, through some mechanism, *all* benefits paid are passed through to the purchaser, it is not insurance; it is a self-funded plan, and the "insurance company" is then acting as a third party administrator, not an insurer.

Many employers in West Virginia, like employers throughout the country, fund employee benefit plans through the purchase of insurance. These plans may contain stop-loss components, such as (i) the implementation of high deductibles, or (ii) premiums based dollar-for-dollar upon benefits paid up to some amount for any number of categories (*e.g.,* per employee, per prescription drug, per month). But to the extent that benefit plans established

through the purchase of insurance transfer risk to an insurance company, they are insurance.

To hold that an insurance product is not insurance because it is partially "self-funded" enormously and unnecessarily complicates the Deemer Clause analysis. It is very important that the Supreme Court address this matter and draw a bright line; otherwise, the ability of States like West Virginia to effectively regulate the business of insurance falls into question.

CONCLUSION

This case is of extreme importance because it impairs the ability of States to regulate the practices of insurers selling employee benefit insurance products. Congress was clear with its passage of the McCarran-Ferguson Act that States should have the right to regulate insurance. However, with decisions such as the Fourth Circuit's in this case, the courts are unnecessarily stripping the States of their ability to regulate the business of insurance.

The case is also important because it expands the scope of the Deemer Clause to employee benefit plans that are not completely self-funded, thereby further restricting the application of state insurance law.

Finally, a decision based on facts such as presented in this case should not be made in a legal vacuum. The States each have an organization in place for the regulation of insurance and the protection of policyholders. This is not true of the federal government. Consequently, a ruling that state insurance regulation is preempted is also a ruling that purchasers of insurance effectively have no legal protection.

It is extremely important to the Insurance Commissioner that the recognized right of the States to regulate and tax insurance companies is not taken away or unnecessarily impaired. As such, the Insurance Commissioner of the State of West Virginia requests that this Court issue a Writ of Certiorari to the Fourth Circuit in this case.

Respectfully submitted,

/s/ JEFFREY W. VAN GILDER

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